STATE OF MICHIGAN

COURT OF APPEALS

SARAH A. MUKHERJEE, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED May 25, 2010
v	No. 290030 Saginaw Circuit Court
MUKUNDA D. MUKHERJEE, Defendant-Appellant/Cross-Appellee.	LC No. 04-053337-DO

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right, and plaintiff cross-appeals as of right, the trial court's judgment of divorce. We affirm.

Defendant first argues on appeal that the trial court's findings in regard to fault, although based on plaintiff's testimony, are clearly erroneous because the conduct attributed to defendant occurred decades before plaintiff's decision to file for divorce, and therefore, there is no cause and effect relationship between the conduct and the breakdown of this marriage. We disagree.

"In a divorce action, this Court's review of the trial court's factual findings is limited to clear error. A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *McNamara v Horner (After Remand)*, 255 Mich App 667, 669-670; 662 NW2d 436 (2003). With respect to fault:

> The relative value to be given the fault element in a particular case and the extent to which particular actions are regarded as fault contributing to the breakdown of a marriage are issues calling for a subjective response; such matters are left to the trial court's discretion subject to the requirement that the distribution not be inequitable. The trial court is in the best position to determine the extent to which each party's activities contributed to the breakdown of the marriage. [*Hanaway v Hanaway*, 208 Mich App 278, 297; 527 NW2d 792 (1995).]

In this case, in the divorce opinion and order, the trial court determined that fault for the breakdown of the marriage relationship was attributable to defendant "for his philandering,

criminal behavior, and unstable home environment as a result of defendant's lifestyle and actions. The defendant had joined various dating services while married, visited certain 'dance clubs,' and had an unstable employment history. There was also evidence presented of physical abuse toward the plaintiff." In the findings section, the court further noted that, "although the defendant claims that the marriage in part broke down because of the geographical distancing that took place between the parties, the court . . . finds that the defendant was more able to obtain employment in Saginaw than in other areas and he was responsible for any geographical distancing."

The testimony and other evidence presented at trial supported the trial court's finding that defendant was at fault. First, it is undisputed that defendant, a physician, was serving the equivalent of a life sentence in federal prison for 44 counts of illegal distribution of a controlled substance. Second, the record is also quite clear that defendant never maintained stable employment, forcing the family to move several times from Minot, North Dakota, to Dayton, Ohio, to Chicago, Illinois, to Rome, New York, to Tucson, Arizona, and then finally, to Saginaw, Michigan, where they remained from 1988 onward. Defendant himself made several additional moves. While defendant lived apart from his family, he saw them only on occasional weekends. Furthermore, although defendant portrayed his disjointed career as a result of being "sought after" by headhunters, he admitted that he "carr[ied] some baggage" due to accusations of wrongdoing by patients and coworkers. Further, while he would not characterize his separations as firings, he admitted that his contracts were not renewed.

Third, plaintiff gave testimony regarding physical abuse and infidelity, and regardless of defendant's denials, "this Court defers to a trial court's findings of fact stemming from credibility determinations." *Berger v Berger*, 277 Mich App 700, 718; 747 NW2d 336 (2008). Plaintiff testified that, while the family lived in Dayton, Ohio, she was subjected to "some slapping and being pushed on the floor," and defendant also engaged in "some intense threatening and occasionally slapping" of the children. In Arizona, defendant's behavior improved somewhat, although he did, on one occasion, kick plaintiff hard enough to leave a bruise. Plaintiff described additional incidents including those where defendant (1) pulled her off a chair, dragged her across the carpet, and hit her in the face, (2) pushed her down the stairs, and (3) slapped her in the face while she was driving. She described defendant's behavior as "irrational" and "very explosive," and stated that such abusive incidents happened from once or twice a year to once every two months in the last year that the couple was together.

Regarding plaintiff's infidelity, plaintiff testified that she discovered a contract and other documents indicating that defendant used dating services in New York and Michigan. One of the contracts (signed in 1986) and the other documentation, as well as credit card statements listing expenditures at various nude dancing establishments, were admitted at trial. The last straw for plaintiff was when she discovered a used condom in defendant's bathroom. When defendant testified, he insisted that someone else had used the condom; however, he admitted to participating in three dating services,[1] going on six dates, and frequenting nude bars such as Déjà

[1] Defendant alleged that he did not know he was signing a contract for a fourth dating service.

Vu and Flint Theatrical. Thus, in light of the testimony and evidence presented at trial, the trial court did not clearly err in determining that defendant was at fault for the breakdown of the marriage relationship because of his philandering, criminal behavior, and unstable employment history.

Defendant next argues that the property award in this case was inequitable and intended to punish him, and that the inequity was further exacerbated by the court's finding that he was solely responsible for the debt to his brother. We disagree.

"If the trial court's findings of fact are upheld, [this Court] then must decide whether the dispositive ruling was fair and equitable in light of those facts. A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *McNamara*, 255 Mich App at 670.

On July 31, 2008, the trial court entered an opinion and order. The court noted that the parties stipulated to the disposition of the real property. Plaintiff received the parties' Ohio property and defendant received their North Dakota property. The parties were to transfer their ownership interests in a Florida property to defendant's brother, in exchange for him releasing any interest in their Ohio property. The parties would hold the Fenton home as joint tenants with full rights of survivorship. Plaintiff could occupy the premises if she paid half of the mortgage, taxes, insurance and upkeep. Defendant was entitled to purchase the property from plaintiff should he be released from prison; otherwise, if the property was sold, the proceeds would be divided 60 percent to 40 percent in plaintiff's favor. In its award of real property, the trial court also stated that "each party is entitled to keep the bank account in which monies generated from rental of out-of-state property awarded to that party were deposited without claim to the other."

The pension and retirement awards were as follows:

> 1. Plaintiff was awarded her Municipal Employees' Retirement System account in the value of $262,899.
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> 2. Plaintiff was further awarded the Fidelity (SISD) Retirement Savings Plan. The value is $10,847.
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> 3. Defendant's Teachers Insurance and Annuity Association, College Retirement Equities Fund account was awarded 60 percent to plaintiff and 40 percent to defendant. The value is $424,378.
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> 4. The Merrill Lynch SEP account was similarly awarded 60 percent to plaintiff and 40 percent to defendant. The value is $236,013.

Defendant was awarded additional investments and accounts totaling $27,483.16. The court conditionally awarded plaintiff Indian jewelry (which had been given to plaintiff by defendant's mother); however, if she chose to take the jewelry, then a Janus Capital account (in the amount of $151,960.25) that had been awarded to her would go to defendant instead. Finally, the court found that the parties were responsible for their own attorney fees. On August 28, 2008, the court entered an order supplementing its findings, which stated, inter alia, that

defendant was responsible for all debts incurred for his legal fees or other monies borrowed from his brother, including a $157,711 loan, which defendant claimed was a joint marital debt.

In the divorce judgment entered on January 6, 2009, the court reiterated its earlier rulings on the retirement accounts, Indian jewelry, additional accounts and investments to defendant, and attorney fees. The court changed its award of the Florida property, giving it to defendant instead of his brother and removed the provision for a 60-40 split should the Fenton property be sold. The court additionally ruled:

> [T]he monies that were seized by the federal government and then released to the parties, being certain cash bank accounts and said bank accounts were eventually turned over by the federal government to this court and was subsequently turned over to an account being held in trust by the plaintiff's attorney and the court further finding that $1,000 of those accounts was an asset of the parties' daughter, the court awards the balance of said accounts in the amount of approximately $22,680 to defendant.

The court again stated that the parties were "responsible for their own separate debts."

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained." *Berger*, 277 Mich App at 716-717. A trial court may consider the following factors:

> (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. When dividing marital property, a trial court may also consider additional factors that are relevant to a particular case. [*Id.*; see also *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003), *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992), *McDougal v McDougal*, 451 Mich 80, 88-89; 545 NW2d 357 (1996), and *Sands v Sands*, 442 Mich 30, 34-36; 497 NW2d 493 (1993).]

Where any of the factors "are relevant to the value of the property or to the needs of the parties, the trial court shall make specific findings of fact regarding those factors." *Sparks*, 440 Mich at 159. Further, "the conduct of the parties during the marriage may be relevant to the distribution of property, but the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance." *Id*. at 158.

In the divorce opinion and order, the court listed the abovementioned factors, and then made findings that (1) plaintiff is 60 years old and defendant is 64, (2) the parties had been married for 34 years, (3) defendant had an unstable employment history, (4) plaintiff cared for the children and worked part time until the family moved to Saginaw, where she maintained full-time employment to the present day, (5) plaintiff was solely responsible for "preserving any semblance of family" and raising the children, (6) plaintiff gave testimony regarding defendant's

infidelity, (7) defendant was convicted of multiple counts of writing false prescriptions, which resulted in a sentence exceeding 100 years, (8) "geographic distance" between the parties throughout their marriage was the result of defendant's actions, and (9) spousal support was not warranted. The court then noted that its property award was in accordance with *Sands*, which advised that "[t]he determination of relevant factors will vary depending on the facts and circumstances of the case." *Sands*, 442 Mich at 34; see also *Sparks*, 440 Mich at 159.

Thus, in addition to fault, the court's findings addressed (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the life situation of the parties, and (8) the parties' past relations and conduct. Therefore, the court properly considered fault and several other factors, and there is no basis for this Court to conclude that the distribution was inequitable. *Hanaway*, 208 Mich App at 297.

Finally, as noted, the court found that each party should be responsible for his or her own debt. Although defendant attempted to portray the $157,711 loan from his brother as necessary to support both his clinic and his family, plaintiff testified that, after 1999 when defendant opened the clinic and moved to Fenton, defendant did not give her or the children any money. As noted above, "this Court defers to a trial court's findings of fact stemming from credibility determinations." *Berger*, 277 Mich App at 718. Therefore, it was not inequitable for the court to require the parties to be responsible for their own debt.

Defendant next argues that the trial court failed to place a value on the Indian jewelry. We disagree.

"Findings of fact, such as a trial court's valuation of particular marital assets, will not be reversed unless clearly erroneous. A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Woodington v Shokoohi*, __ Mich App __; __ NW2d __ (Docket No. 288923, issued May 4, 2010), slip op, p 2. "[A] trial court clearly errs when it fails to place a value on a disputed piece of marital property." *Olson v Olson*, 256 Mich App 619, 627-628; 671 NW2d 64 (2003).

MCR 3.211(B) requires a divorce judgment to include a determination of the property rights of the parties. "As a prelude to this property division, a trial court must first make specific findings regarding the value of the property being awarded in the judgment . . . ." *Olson*, 256 Mich App at 627. A court can make such a valuation via expert testimony, lay testimony, the parties' testimony, "or the trial court could appoint its own independent expert to provide it with a perhaps more objective valuation." *Id*. at 627 n 4. "[W]here a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). Moreover, a trial court is in the best position to judge the credibility of the witnesses. *Pelton v Pelton*, 167 Mich App 22, 25-26; 421 NW2d 560 (1988).

In this case, defendant testified that the disputed Indian jewelry consisted of 22 pieces, including bangles worn on both arms and a necklace, which were 98.5 percent pure gold. He had an appraisal done in 1977, which determined that the value of the gold alone was $10,017. Although defendant had not sought any additional appraisals on the jewelry, he estimated that its present-day value was $210,000. Plaintiff had the necklace appraised and determined that its value was $900. In its disposition of the marital assets, the trial court allowed plaintiff to choose

between the Indian jewelry and a Janus Capital account in the amount of $151,960.25. Thus, given the extent of defendant's testimony, defendant "cannot complain that the finding by the trial court . . . is erroneous, when no expert testimony was presented on the question and there was no offer to bring in a professional appraiser nor a request to supplement the record." *Sullivan v Sullivan*, 175 Mich App 508, 511; 438 NW2d 309 (1989).

Plaintiff argues on cross-appeal that the trial court erred in failing to award her the portion of her attorney fees that resulted from defendant's misconduct. We disagree.

"This Court reviews a trial court's grant of attorney fees for an abuse of discretion." *Wright v Wright*, 279 Mich App 291, 306-307; 761 NW2d 443 (2008). "Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error but questions of law are reviewed de novo." *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005).

"Under the 'American rule,' attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract. In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C)." *Reed*, 265 Mich App at 164. MCL 552.13(1) provides:

> In every action brought, either for a divorce or for a separation, the court may require either party . . . *to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency*. It may award costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver. [Emphasis added.]

"This Court has also held that an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Specifically, as provided in MCR 3.206(C):

> A party who requests attorney fees and expenses must allege facts sufficient to show that
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> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
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> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

Plaintiff admits that only subparagraph (b) applies in this case; however, plaintiff cites the following reasons why she is entitled to attorney fees: (1) plaintiff had to hire an attorney to obtain the release of property seized by the federal government as the result of the criminal action against defendant, (2) one of plaintiff's divorce attorneys was involved with the federal court in obtaining the release of marital assets, (3) plaintiff expended additional funds for her divorce attorney to travel to Terre Haute, Indiana, for defendant's deposition because defendant

was incarcerated in federal prison, and (4) through his attorney, defendant withdrew assets from the TIAA-CREF account, even though the court ordered it frozen.

Thus, plaintiff cites only one instance of defendant refusing to comply with a court order, i.e., withdrawing money from the TIAA-CREF account after it had been frozen by an order entered December 20, 2005. At trial, defendant's lawyer John David Perez[2] admitted that the rental income from the North Dakota property, as well as distributions from defendant's TIAA-CREF account, went into Perez's trust account. Defendant had directed that such funds be deposited into an account to make sure that there was enough money to pay the bills on the Fenton property and Perez complied. Having heard this testimony on the first day of trial in March 2007, however, the court entered a subsequent order allowing defendant's attorneys to be paid from this account containing the TIAA-CREF funds. Moreover, as discussed above, plaintiff was ultimately awarded 60 percent of the TIAA-CREF account. Therefore, the trial court did not abuse its discretion in refusing to award attorney fees to plaintiff on the grounds that defendant violated a court order.

Finally, plaintiff argues on cross-appeal that the trial court abused its discretion by awarding plaintiff $23,679 that was initially seized by the federal government, and then reversing its decision and requiring that plaintiff repay this money to defendant. We disagree.

"A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *McNamara*, 255 Mich App at 669-670.

On February 9, 2007, prior to the start of trial, Assistant United States Attorney Rita Foley informed the trial court that the federal government had agreed to return $23,679.80 to the parties. The funds had been seized from six different bank accounts, including a Citizens Bank account in the amount of $20,217.21. On March 21, 2007, the trial court accepted a check for $23,679.80 from the United States Marshall and ordered the funds disbursed to plaintiff's attorney, from which the attorney could keep $5,000. Plaintiff's attorney was ordered to put the remaining funds in an interest-bearing account under plaintiff's name to be held until further order or the court.

On September 12, 2007, the trial court entered an order allowing defendant's attorney to be paid $9,000 from an account containing the income from the North Dakota property as well as TIAA-CREF monthly distributions. Plaintiff's attorneys were allowed to withdraw the same amount for fees incurred from the account containing the funds returned from the federal government. The order further stated, "said monies will not otherwise be treated as a dilution of marital assets when this court considers distribution and award of assets herein even though *adjustments will be made to accommodate said disbursements if necessary to effectuate the Court's ultimate award of property*." (Emphasis added). Similar orders were entered on November 5, 2007, awarding defendant's attorney $9,000 and plaintiff's attorney $5,000 from

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[2] Perez initially represented defendant in the divorce action and criminal proceedings, and then went on to manage defendant's affairs.

the respective accounts. On March 13, 2008, the trial court awarded $9,055.33 to defendant's attorney and the remaining $893.51 to plaintiff's attorney.

As noted by plaintiff, at trial, defendant testified that the Citizens Bank account, one out of the six accounts returned by the federal government, held money from the North Dakota property. There is no testimony regarding where the money in the other accounts came from. Nevertheless, in its initial divorce opinion and judgment, the trial court stated, "defendant is to be paid $23,000 by the plaintiff from the monies received from the North Dakota property. It is further ordered that each party is entitled to keep the bank account into which monies generated from rental of out-of-state property awarded to that party were deposited without claim to the other."

At a subsequent motion hearing on November 24, 2008, plaintiff argued that, of the accounts seized by the federal government, only the Citizens account contained money from the North Dakota property, and plaintiff had hired another attorney to petition the federal government to release the funds from all six of the accounts. The court refused to change its award. The subject was revisited at another hearing on November 25, 2008, and the court explained its position by noting that the Citizens account held the bulk of the funds ($20,217.21). The court affirmed its position that the award was part of the entire equitable division of the property. The court did note that $1,000 of the funds was determined to belong to one of the daughters, and this was reflected in the divorce judgment, which stated that "the court awards the balance of said accounts in the amount of approximately $22,680 to defendant."

Accordingly, while the initial $23,679.80 seized by the federal government was made up of funds from accounts that contained monies from sources other than the North Dakota property, the trial court correctly noted that most of the money, $20,217.21, was in fact income from the North Dakota property. Therefore, the court's award of this money to defendant was in harmony with the parties' stipulation (incorporated into the divorce judgment) that the North Dakota property and associated income would go to defendant, while the Ohio property and its rents would belong to plaintiff. Further, as discussed above, the disposition as a whole was equitable. The trial court did not abuse its discretion by requiring plaintiff to repay the money to defendant.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio